

**Vasquez v Reluzco**

2005 NY Slip Op 30393(U)

March 15, 2005

Supreme Court, New York County

Docket Number: 108143/03

Judge: Shirley Werner Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH  
J.S.C.  
Justice

PART 54

Clara Vassallo & Thomas  
Rockey  
- v -  
Eduardo Relygo et al

INDEX NO. 108/13/02  
MOTION DATE 12/9/04  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is denied in accordance with the annexed decision*

**FILED**

MAR 24 2005

NEW YORK COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_

*2/17/05*

**SHIRLEY WERNER KORNREICH**  
J.S.C.

*[Signature]*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
CLARA VASQUEZ and TOMAS PACHECO,

Plaintiffs,

Index No.: 108143/03

-against-

**DECISION,  
ORDER and  
JUDGMENT**

EDUARDO RELUZCO, NEW YORK CITY SCHOOL  
CONSTRUCTION AUTHORITY and THE CITY OF  
NEW YORK,

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

This is an action brought to recover for personal injuries allegedly suffered in a May 15, 2002 automobile accident. Defendants now move for summary judgment dismissing the complaint, alleging that plaintiffs suffered no serious injury.<sup>1</sup> In support, they have submitted the affirmation of counsel and copies of: the summons and complaint; the accident report, dated May 15, 2002; defendants' verified answer and demands; plaintiffs' verified bill of particulars; and the sworn reports of Daniel J. Feuer, M.D. Plaintiffs have opposed, submitting the affirmation of counsel as well as copies of: certified mail receipts; notices of claim; uncertified hospital records from the Metropolitan Hospital emergency room; uncertified medical records from Neuro Care Associates, P.C., et al.; the affirmations of Larry N. Neuman, M.D. and accompanying medical report for each plaintiff; plaintiffs' affidavits; and uncertified MRI reports. Defendants have replied.

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<sup>1</sup> Although defendants' motion for summary judgment also sought recovery on the theory that Mr. Pacheco had not served a timely notice of claim, at oral argument on the motion, defendants conceded the notice of claim issue. As such, the Court will only address defendants' arguments for summary judgment arguments based on plaintiff's failure to demonstrate a serious injury.

## Facts

The complaint alleges that plaintiff Vasquez “sustained severe injury and considerable pain and suffering, was compelled to seek medical care, was prevented from attending to her usual duties and may continue to be so damaged in the future.” Compl., para. 18. The verified bill of particulars further delineates Ms. Vasquez’s injuries as permanent and consisting of:

Post concussion syndrome, traumatic cervical syndrome with multiple cervical disc herniations, traumatic low back syndrome with a lumbar disc herniation, post traumatic stress disorder, shock[,] tension, pain and embarrassment.

Bill of Particulars, para. 9.

The complaint then alleges that plaintiff Pacheco “sustained severe injury and considerable pain and suffering, was compelled to seek medical care, was prevented from attending to his usual duties, and may continue to be damaged in the future. Compl., para. 24.

The verified bill of particulars specifies Mr. Pacheco’s injuries as:

Disc bulges at C2-C3, C3-C4, C4-C5, C5-C6, C6-C7, shock, pain, tension and embarrassment.

Bill of Particulars, para. 9. The injuries of both plaintiffs were claimed to be permanent. Id.

By affirmation, Dr. Daniel J. Feuer has reported on both plaintiffs. In his May 10, 2004 affirmed report, he states that Ms. Vasquez is a forty-two year old woman who described her health as good until May 15, 2002, when she was involved in the instant automobile accident. She was self-employed in a housekeeping business and denied any past medical history involving trauma.

Ms. Vasquez told Dr. Feuer she sustained no head trauma or loss of consciousness, but injured her neck and lower back. She told Dr. Feuer that she was taken from the accident scene

to the Metropolitan Hospital emergency room, was examined and x-rayed there and was then released. She obtained treatment from a doctor to whom her lawyer referred her, the next day. At the time of Dr. Feuer's examination, Ms. Vasquez complained of recurrent neck and low back pain. She denied radiating pain, bowel or bladder dysfunction or focal weakness. Further, at the time, she was not taking any medication and was not undergoing therapy or treatment.

Upon examination, Dr. Feuer found that Ms. Vasquez was in no acute distress and had no trouble getting on or off the examining table. Dr. Feuer found Ms. Vasquez's cervical spine to be "nontender," without spasm and with full range of motion horizontally and vertically. He also found the thoracic spine "nontender" and with full range of motion. In the lumbosacral spine, he found "mild bilateral paraspinal tenderness," but found no spasm and found no problem with leg raising. The remainder of the examination covered mental status, the cranial nerves, motor and sensory tests, coordination and gait, which were found to be normal. Dr. Feuer found Ms. Vasquez's neurological examination normal.

As to Mr. Pacheco, Dr. Feuer, in his May 10, 2004 affirmed report, stated that Mr. Pacheco was a fifty-one year old male who complained of neck and lower back injury as a result of the May 15, 2002 accident. There was no head trauma, and Mr. Vasquez, who did not lose consciousness, was taken to the Metropolitan Hospital emergency room where he was examined and x-rayed. No fractures were found, and he was released. He was then treated by Dr. Neuman, a physician to whom he was referred by his lawyer.

Mr. Pacheco denied radiating pain, bladder or bowel dysfunction and focal weakness. Nor was he, at the time of the examination, taking medication or undergoing treatment. Mr. Pacheco denied any medical history and was retired from active employment.

Dr. Feuer found that Mr. Pacheco was in no acute stress. His head was normal and his cervical spine was not tender, had no spasm and had full range of motion. His lumbosacral spine also was not tender and had no spasm, and he was able to leg raise bilaterally. His mental status, cranial nerves, motor abilities, sensory nerves, coordination and gait were all normal. Dr. Feuer found the neurological examination failed "to demonstrate objective deficits referable to the central or peripheral nervous system." He found no objective deficits and diagnosed Mr. Pacheco as normal and not in need of treatment.

Ms. Vasquez has submitted an affidavit, dated October 15, 2004, in which she avers that, on May 15, 2002, her vehicle was struck by an automobile owned by defendant Relizco. She was taken by ambulance to metropolitan hospital, complaining of back and neck pain, was x-rayed and was released with medication. She then went to Dr. Larry Neuman for treatment and was treated by him until February 24, 2003. She also consulted with Dr. Carr, a neurologist on June 3, 2002, Dr. Gutstein on June 3 and 5, 2002 and underwent physical therapy sessions in 2002. She further avers that she experienced headaches, nausea, poor concentration, dizziness, neck pain radiating to her arms, low back pain and anxiety and depression during this period. In October 2004, she avers she often has difficulty getting out of bed due to low back pain, was unable to return to her exercise routine at her gym "3 months after the accident," cannot carry heavy grocery bags, cannot do certain types of dancing and, although she cleans as part of her ownership and operation of a cleaning service, she cannot do heavy cleaning and must rely on employees.

An affirmation of Dr. Larry N. Neuman, dated October 1, 2004, avers that his September 7, 2004 report was prepared by him and is true. That report states that Ms. Vasquez was seen at

his office on May 16, 2002 for injuries she stated she sustained in a May 15, 2002 accident. She was treated at and released from the Metropolitan Hospital emergency room where no fractures were found, but analgesics were prescribed.

Ms. Vasquez was described as a forty year old mother of three who was a maintenance worker. She was complaining of: daily headaches, poor concentration, sleep impairment, nausea and dizziness; constant and frequent neck pain which was severe and radiated to both arms and related to weakness and paresthesias of the upper extremities.; frequent, severe low-back pain exacerbated by prolonged sitting, standing walking or weight-bearing; and anxiety and depression.

Dr. Neuman found percussion pain over the C2 and C7 spinous processes 'with marked tenderness and spasm of the cervical paravertebral muscles and range of motion of the cervical spine limited by 50 to 75% in all planes.' He also found percussion pain, tenderness and spasm over the L2-L5 spinous processes and limited range of motion in the lumbosacral spine of 50%. He further found diminished grip strength and positive leg raising. He diagnosed post-concussion syndrome, traumatic cervical syndrome with disc herniation at C5-C7 and L5-S1, traumatic low back syndrome with herniation at L5-S1 and post-traumatic stress disorder. He referred to the MRI and EMG reports. He further found that Ms. Vasquez continued to "manifest functional impairment as [sic] at the most recent visit to this office on 2/24/03." He diagnosed a permanent disability and a guarded prognosis, finding the May 15 accident a competent producing cause of the disability. It appears from the papers that the MRI was conducted by Dr. John T. Rigney and the EMG testing was conducted by Dr. Hal Gutstein. No affirmations from Dr. Rigney or Dr. Gutstein were submitted.

Thomas Pacheco submitted an affidavit, dated October 15, 2004, in which he averred that he was a passenger in Ms. Vasquez's vehicle on May 15, 2002 when the vehicle was struck and was taken by ambulance to Metropolitan Hospital where he complained of pain to his neck and lower back. He was x-rayed and given pain medication upon discharge. The next day, he visited Dr. Neuman and treated with him until November 22, 2002. Further, he avers that he had a CT scan of his head in May 2002 and an MRI of his neck and back in June and July 2002. During the above period, he averred he experienced poor concentration, sleep impairment, nausea, dizziness, neck pain and anxiety and depression. He further averred he was restricted in moving his head and lower back areas and that his life was impacted since he could no longer exercise at the gym, could no longer play league baseball, found it often difficult to get out of bed due to lower back pain, picked up heavy objects with difficulty and could not help his wife in her cleaning business on a regular basis.

An affirmation of Dr. Neuman, dated October 1, 2004, stated that a report for Tomas Pacheco dated September 6, 2004 was prepared by him and is true. In the report, Dr. Neuman states that Mr. Pacheco's last visit was August 12, 2004 and notes that Mr. Pacheco came to see him for the first time on May 16, 2002.

Dr. Neuman describes Mr. Pacheco's past medical history as significant for internal knee derangement from a previous automobile accident and states that Mr. Pacheco is retired. He writes that Mr. Pacheco's chief complaint when first seen was headaches, neck pain, low back pain and anxiety and depression. Dr. Neuman found percussion pain over the C2 through C7 spinous processes, tenderness and spasm in the cervical paravertebral muscles and range of motion in the cervical spine limited to 75%. He also found percussion pain over the L1 through

L5 spinous processes and tenderness and spasm in the erector spinae musculature. Again, range of motion was limited to 75%. Dr. Neuman found diminished grip strength in Mr. Pacheco's right hand and straight leg raising on the right leg positive to 45 degrees. He cites to the MRI and EMG reports, both of which were not certified or sworn to.

Dr. Neuman prescribed analgesics, muscle relaxants, orthotic devices and physical therapy. At the August 12, 2004 visit, Dr. Neuman still found "functional impairment." His findings are exactly the same as those he found on Mr. Pacheco's first visit. Dr. Neuman opined that Mr. Pacheco had sustained permanent disability and found the accident to be the competent producing cause of the injury.

#### Conclusions of Law

To warrant summary judgment, a defendant may establish a prima facie case by submitting an affidavit from an examining physician establishing that no objective findings support the plaintiff's claim of serious injury. Gaddy v. Eyler, 79 N.Y.2d 955, 956-7 (1992); Worley v. Griffith, 273 A.D.2d 303, 304 (2d Dept. 2000); Grossman Wright, 268 A.D.2d 79 (2d Dept. 2000). Once this is demonstrated, the burden shifts to plaintiff to refute the defendant's submissions. Id.; Powell v. Hurdle, 214 A.D.2d 720 (2d Dept. 1995). This must be done by objective, admissible proof, not mere parroting of the statutory language. Lopez v. Senatore, 65 N.Y.2d 1017, 1019 (1985). Conclusory allegations tailored to meet statutory requirements are insufficient to carry the plaintiff's burden. Gaddy v. Eyler, supra at 958.

Here, defendants have established their prima facie case by presenting the affirmation of their examining physician Dr. Daniel Feuer. Nearly two years after the automobile accident, Dr. Feuer related his examination and the specific tests done and found all of plaintiffs' reflexes and

sensations normal and no orthopedic disabilities. See Villalta v. Schechter, 273 A.D.2d 299, 300 (2d Dept. 2000)(examining physician's affirmation finding normal range of motion based on objective tests carried initial burden of establishing no serious injury). The burden then shifted to plaintiffs to establish a triable issue of fact.

New York State Insurance Law defines a serious injury as:

a personal injury which results in . . . 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[.]

NY Ins Law § 5102(d).

Ms. Vasquez has not submitted sufficient evidence to raise a material issue as to whether she suffered a serious injury, as defined by the Insurance Law. Initially, the emergency records from Metropolitan Hospital were not certified (Exs. B & F); her MRI and EMG reports were unsworn (Ex. B); and the unsworn medical records submitted (Exs. C & G) were not recent but, instead, were dated within a one to four month period after the accident. This evidence, thus, is inadmissible to sustain plaintiffs' claims of serious injury. See Charlton v. Almaraz, 278 A.D.2d 145, 146 (1<sup>st</sup> Dept. 2000) (unsworn medical reports are insufficient to satisfy plaintiff's burden of proof since they are not in admissible form).

Ms. Vasquez's affidavit and the report of Dr. Neuman which is affirmed, albeit in a separate document, however, are admissible. Yet, Ms. Vasquez's affidavit which merely recites her complaints from the post-accident period not the present, cannot speak to her medical

condition and diagnosis. Similarly, her claims of her inability to go to the gym for the three months after the injury and to now do some dance steps, as well as, her sometimes morning back pain do not make out serious injury. Indeed, she apparently never stopped working in the maintenance/housekeeping industry.

Moreover, Dr. Neuman's report does not support such injury. Dr. Neuman's findings must be based on a recent examination and objective tests. See Bent v. Jackson, \_\_ A.D.3d \_\_, 788 N.Y.S.2d 56, 58 (1<sup>st</sup> Dept. 2005) (emphasis supplied). See also Grossman v. Wright, 268 A.D.2d 79, 84 (2<sup>nd</sup> Dept. 2000) (plaintiffs' subjective claims of pain and limitation of motion insufficient when not sustained by "verified objective medical findings"). Even positive MRI reports "must be accompanied by objective findings of either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part[.]" in order to raise a triable issue of fact. See Bent, supra, at 59 citing Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345, 353 (2002) (internal citations omitted)

In the instant case, Dr. Neuman's report states that Ms. Vasquez last visited his office on February 24, 2003—less than one year after the accident and more than one year and a half prior to the date of his report. See, supra, Bent at 58 (objective medical findings must be based on "recent examination of the plaintiff"); Graham v. Shuttle Bay, Inc., 281 A.D.2d 372 (1<sup>st</sup> Dept. 2001) (affirmed medical report insufficient to raise triable issue of fact where report "does not indicate the date the doctor examined plaintiff nor is there an explanation for the three-year gap between the date of the affirmed report and the last examination of plaintiff"). This evidence is insufficient to demonstrate a permanent injury.

Additionally, the Vasquez report utterly fails to explain Ms. Vasquez's treatment and the cessation thereof. Thus, based on this record, Ms. Vasquez's treatment consisted of an initial examination on May 16, 2002, a follow-up visit on February 24, 2003<sup>2</sup> and unsworn to MRI and EMG tests, apparently performed by others. There is no competent evidence in the record detailing the course of Ms. Vasquez's physical therapy, its frequency or the reason it ended. See Bent, supra, at 58-59 (distinguishing gap in treatment—which goes to weight of evidence, not its admissibility—and “utterly unexplained cessation of treatment”).

Moreover, Dr. Neuman has failed to set forth any objective tests that he performed. See Grell v. Mabstoa, 288 A.D.2d 259, 260 (2<sup>nd</sup> Dept. 2001) (affirmed reports of plaintiffs' expert insufficient to create triable issue of fact where reports failed to specify nature of objective tests on which conclusions as to restriction of motion were based). Nor do the limited ranges of motion allegedly found, set forth any objective standards used to render those determinations. See Goldin v. Lee, 275 A.D.2d 341, 342 (2<sup>nd</sup> Dept. 2000) (doctor's indication that plaintiff exhibited restricted range of motion in cervical spine insufficient where doctor “failed to set forth what objective tests he performed in arriving at these conclusions”). Ms. Vasquez, thus, has failed to meet her burden of proof.

Similarly, Mr. Pacheco has not met his burden of raising a triable issue of fact. As discussed above, all of the evidence other than Dr. Neuman's report and Mr. Pacheco's affidavit, are inadmissible. Mr. Pacheco, who was retired, spoke of his after-accident complaints and treatment with Dr. Neuman, only until November 22, 2002, six months after the accident. The

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<sup>2</sup> Indeed, while Dr. Neuman's September 7, 2004 report refers to a February 24, 2003 visit, it neither indicates that Ms. Vasquez was examined on that day, nor does it describe any current objective testing or significant range-of-motion restriction.

fifty-one year old Mr. Pacheco presently complaints of inability to exercise as he did before the accident in his health club, play league baseball, sometimes lowerf vback pain when he awakens in the morning, difficulty picking up heavy objects and inability to help his wife in her maintenance business on a regular basis. This was not sufficient to set forth the requisite inability to do his usual activities for 90 out of 180 days.

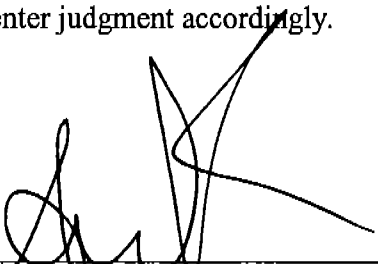
Further, Dr. Neuman, in his report on Mr. Pacheco, has neither set forth what objective tests he performed to reach his conclusions on August 12, 2004 regarding Mr. Pacheco's limited range of motion nor has he provided a sufficient description of the qualitative nature of Mr. Pacheco's limitations based on the normal function, purpose and use of the body part. See Bent, supra, at 59. The Pacheco report fails to establish the extent of Mr. Pacheco's physical limitation as of August 12, 2004, "by designating a numeric percentage to range-of-motion loss or by providing normal range-of-motion degrees in order to ascertain the percentage of this patient's restriction of movement[.]" Bent, supra at 59. Neither has Dr. Neuman described the qualitative nature of Mr. Pacheco's limitations; he merely states that due to "persistence of symptoms spanning a 27 month period, [he] can state within a reasonable degree of medical certainty and probability that the patient has sustained a permanent disability." See the Pacheco Report at 2. This conclusory statement is clearly tailored "simply to meet statutory requirements." See Bent, supra at 59. Most important, mr. Pacheco avers that he last treated with Dr. Neuman on November 22, 2002, yet Dr. Neuman speaks of an August 12, 2004 visit. More disturbing his report as to Mr. Pacheco's alleged disabilities are merely a recitation of the previous 2002, post-accident findings. Based on all of the above, the Court finds plaintiff Pacheco has failed to raise any genuine issues of fact as to serious injury. Consequently, defendants are entitled to summary

judgment. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Date: March 17, 2005  
New York, New York

  
\_\_\_\_\_  
SHIRLEY WERNER KORNREICH

**FILED**  
MAR 24 2005  
NEW YORK  
COUNTY CLERK'S OFFICE