Smeja v Fuentes
2006 NY Slip Op 30694(U)
August 3, 2006
Supreme Court, Suffolk County
Docket Number: 03-27994
Judge: Robert W. Doyle

[* 1]

SHORT FORM ORDER

INDEX NO. 03-27994
CAL. NO. 05-02166-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-27-06 (#001)
4-7-06 (#002)
ADJ. DATE 4-7-06
Mot. Seq. #001 - MG; CASEDISP
#002 - XMD

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LYNNE SMEJA,

Plaintiff,

– against –

JUAN FUENTES and OSCAR G. GARCIA,

Defendants.

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; cross motion for partial summary judgment on issue of liability : Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 34; Answering Affidavits and supporting papers 35- 38; Replying Affidavits and supporting papers 39 - 40; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted; and it is

ORDERED that the cross motion by plaintiff for partial summary judgment in her favor on the issue of liability is denied.

Plaintiff Lynne Smeja commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on Route 112 in the Town of Brookhaven on May 2, 2002. The accident allegedly occurred when a vehicle owned by defendant Oscar Garcia and operated by defendant Juan Fuentes struck the rear of plaintiff's

vehicle, which was stopped for a red light. Plaintiff alleges in her bill of particulars that she sustained various injuries in the accident, including herniated discs at levels C3-4 and C4-5; a bulging disc at level C6-7; cervical radiculopathy; and myofascial pain dysfunction syndrome. She alleges that she was confined to home for one day after the accident, and that she continues to be partially disabled. Plaintiff's deposition testimony indicates that she did not miss any work as a result of the accident.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law §5102 (d) as a result of the subject accident. Defendants' submissions in support of the motion include copies of the pleadings, a transcript of plaintiff's deposition testimony, copies of magnetic resonance imaging (MRI) reports regarding plaintiff's cervical spine, and sworn medical reports prepared by Dr. Joseph Stubel and Dr. Richard Pearl. At defendants' request, Dr. Stubel, an orthopaedist, and Dr. Pearl, a neurologist, conducted examinations of plaintiff in December 2004 and reviewed medical records related to plaintiff's alleged injuries.

Dr. Stubel's report states that plaintiff presented with complaints of neck pain radiating into the left shoulder, and denied any past history of accidents, injuries or chronic diseases. It states, in relevant part, that plaintiff exhibited normal range of motion in the cervical region of her spine, with no sign of muscle spasm or tenderness on palpation. It states that plaintiff had normal and symmetrical reflexes, normal muscle strength, and normal sensation in her upper extremities. It further states that palpation of the deep cervical nerve roots did not evoke any radicular signs. Dr. Stubel diagnosed plaintiff as suffering a cervical sprain. He concludes that there are no objective signs of disability related to the subject accident, and that plaintiff is able to perform her job and the usual activities of daily living.

Dr. Pearl's report states that plaintiff complained of pain and a "burning sensation" in her neck, and occasional tingling in her hand. It states that plaintiff's medical history includes a diagnosis of multiple sclerosis made 10 to 11 years ago, and that plaintiff alleges she has not had a reoccurrence of symptoms since that time. The report states, among other things, that plaintiff exhibited normal range of motion in the cervical and lumbar regions during the examination. It states that plaintiff walked with a normal gait, with no sign of cerebellar dysfunction. It states that plaintiff had normal muscle tone and strength in her extremities; that her deep tendon reflexes were normal; and that her sensory perception was intact. Dr. Pearl concludes that there is no evidence that plaintiff suffers from any neurological disability.

Also submitted by defendants was an affirmed medical report prepared by Dr. Stephen Lastig, a radiologist who conducted an independent review of the MRI study of plaintiff's cervical spine performed in January 2004, and an affirmed medical report prepared by Dr. Edward Weiland for plaintiff's no fault insurance carrier. Dr. Lastig's report states that the MRI films revealed small disc herniations at levels C3-4 and C4-5, and a bulge impressing upon the ventral subarachnoid space at level C6-7. Moreover, it states that the films showed from

multilevel degenerative disc disease and multilevel disc dessication in the cervical spine. Dr. Lastig concludes that the disc pathology at the C6-7 level of plaintiff's spine is degenerative in origin. He also states that the precise etiology of the small disc herniations cannot be determined based on the single MRI study. Dr. Weiland, a neurologist, opines in his report that an examination of plaintiff conducted in February 2004 revealed no evidence of any neurologic disability causally related to the subject accident. The Court notes that Dr. Weiland's report states that plaintiff's medical history includes a motor vehicle accident approximately 10 years earlier that caused sustained neck trauma, and that plaintiff has complained of periodic paresthesias in the lower extremities and episodic neck and arm pain since such accident.

Plaintiff opposes the motion for summary judgment, arguing that evidence annexed to the opposition papers demonstrates that she sustained herniated discs in the accident, resulting in loss of mobility and motion in her cervical spine. Plaintiff's opposition papers include an affirmed report prepared by her treating neurologist, Dr. Edward Firouztalé; an affidavit by plaintiff; copies of correspondence to the no fault carrier from Dr. Donald Holzer, a neurologist who previously treated plaintiff; and various unsworn MRI reports regarding plaintiff's cervical spine prepared in 1995, 1996, 1998, 2002 and 2004.

The Court notes that the unsworn MRI reports prepared in 1995, 1996 and 1998 are without probative value and were not considered by the Court in its determination of the motion (*see*, ***Yakubov v CG Trans Corp.***, __ AD3d __, 2006 WL 1640665 [2d Dept, June 13, 2006]; ***Legendre v Siqing Bao***, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; ***Hernandez v Taub***, 19 AD3d 368, 796 NYS2d 169 [2d Dept 2005]). However, the unsworn MRI reports from 2002 and 2004 were considered, as was the letter by Dr. Holzer dated January 8, 2003, as these documents were relied upon by defendants ***Jackson v New York City Tr. Auth.***, 273 AD2d 200, 708 NYS2d 469 [2d Dept 2000]; ***Perry v Pagano***, 267 AD2d 290, 699 NYS2d 882 [2d Dept 1999]; ***Pech v Yael Taxi Corp.***, 303 AD2d 733, 758 NYS2d 110 [2d Dept 2003; ***Raso v Statewide Auto Auction***, 262 AD2d 387, 691 NYS2d 158 [2d Dept 1999]).

According to plaintiff's affidavit, she first sought treatment from Dr. Firouztalé, a neurologist, in January 2004. The report by Dr. Firouztalé states that plaintiff complained of intermittent cervical radicular pain extending into the left fingers, and pain extending through the spine when she looks down quickly. She also complained of occasional mild weakness in the left extremity. The report states that Dr. Firouztalé diagnosed plaintiff as suffering from cervical radicular syndrome secondary to disc herniations at C3-4 and C4-5 and a broad-based disc bulge at C6-7. It states, among other things, that at her last examination in January 2006, plaintiff walked without difficulty and exhibited normal strength in all muscle groups. It states that the motion in plaintiff's cervical spine was "decreased to flexion and extension with pain" during testing. It also states that while plaintiff's radicular symptoms persist, they have improved considerably as a result of physical therapy and home exercises. Dr. Firouztalé, however, does not offer an opinion in his report as to the cause or permanency of plaintiff's alleged injuries.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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."

To recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 299, 727 NYS2d 378 [2001]). To establish an injury within the "permanent consequential limitation of use" or the "significant limitation of use" categories, the medical evidence submitted by a plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member or function (*see*, ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * 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" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see*, ***Toure v Avis Rent A Car Sys.***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see*, ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see*, ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, *supra*, at 270, 587 NYS2d 692). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see*, ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see*, ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by defendants establishes prima facie that plaintiff did not sustain a serious injury in the subject accident, and that her complaints of pain and restricted movement are attributable to a preexisting degenerative disc condition in her cervical spine (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]; ***Nelson v Amicizia***, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]; ***Clark v Perry***, 21 AD3d 1373, 801 NYS2d 645 [4th Dept 2005]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). The Court notes that a defendant who submits admissible proof that a plaintiff has full range of motion and suffers no disabilities as a result of the subject accident establishes a prima facie case that the plaintiff did not sustain a serious injury, despite the existence of an MRI report showing a herniated or bulging disc (*see*, ***Meely v 4 G's Truck Renting Co.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Diaz v Turner***, 306 AD2d 241, 761 NYS2d 93 [2d Dept 2003]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see*, ***Gaddy v Eyler***, *supra*).

Contrary to the conclusory assertions by plaintiff's counsel, the affirmed report by Dr. Firouztalé fails to raise a triable issue of fact. Significantly, Dr. Firouztalé's report does not address the question of whether the alleged limitations in plaintiff's cervical spine are causally related to the accident. Further, when a defendant in an action to recover damages for serious injury presents evidence demonstrating that a plaintiff's alleged pain and injuries are related to a preexisting condition, the plaintiff must come forward with evidence addressing the defense of lack of causation (***Pommells v Perez***, *supra*, at 580, 797 NYS2d 380; *see*, ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Mullings v Huntwork***, 26 AD3d 214, 810 NYS2d 443 [1st Dept 2006]; ***Clark v Perry***, *supra*; ***Shaw v Looking Glass Assocs.***, 8 AD3d 100, 779 NYS2d 7 [1st Dept 2004]). If a plaintiff suffers from a preexisting medical condition, it is not the original injury, but the aggravation of the condition as caused by the subject accident that must be shown to constitute a "serious injury" (*see*, ***Knoll v Seafood Express***, 17 AD3d 233, 793 NYS2d 391 [1st Dept], *affd* 5 NY3d 817, 803 NYS2d 25 [2005]; ***Suarez v Abe***, 4 AD3d 288, 772 NYS2d 317 [1st Dept 2004]; ***Trunk v Spross***, 306 AD2d 463, 761 NYS2d 322 [2d Dept 2003]). Dr. Firouztalé's report fails to address the findings by defendants' experts that plaintiff suffers from a degenerative condition in her cervical spine or to explain how such condition may have affected his diagnosis (*see*, ***Franchini v Palmieri***, *supra*; ***Gomez v Epstein***, 29 AD3d 950, 2006 WL 1493492 [2d Dept 2006]; ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Kaplan v Vanderhans***, 26 AD3d 468, 809 NYS2d 582 [2d Dept 2006]).

Also, a plaintiff claiming a serious injury within the "significant limitation of use" category must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations in movement and their duration (*see*, ***Yakubov v CG Trans Corp.***, *supra*; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bowober Yeshiva Bnei Zion***, *supra*; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [2d Dept 1991], *lv denied* 79 NY2d 753, 581 NYS2d 281 [1992]). A plaintiff must present medical proof contemporaneous with the accident showing the initial restrictions in movement or

an explanation for its omission (*see*, ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent examination (*see*, ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). Here, plaintiff did not present any medical proof contemporaneous with the accident showing significant limitations in the function of the cervical region of her spine due to injuries sustained in the accident (*see*, ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Ranzie v Abul-Massih***, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]). In addition, Dr. Firouztalé's report does not state the measurements taken during range of motion testing or provide an assessment of the functional ability of plaintiff's cervical spine (*cf.*, ***Mazo v Wolofsky***, 9 AD3d 452, 779 NYS2d 921 [2d Dept 2004]). Finally, plaintiff's self-serving affidavit, which contains allegations of continued pain and restricted movement in her neck, is insufficient to defeat summary judgment (*see*, ***Young v Ryan***, 265 AD2d 547, 697 NYS2d 150 [2d Dept 1999]; ***Kauderer v Penta***, *supra*).

Accordingly, defendants' motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted. Plaintiff's cross motion for partial summary judgment on the issue of liability, therefore, is denied as moot.

Dated: AUG 03 2006

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**